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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

FELIX UITHOVEN,
Petitioner,

VERSUS

MICHAEL P. W. STONE,
SECRETARY OF THE ARMY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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45 pp

QUESTIONS PRESENTED

1. Whether the Water Resources Development Act, 33 U.S.C. § 2283, providing property may not be taken by the United States from unwilling sellers for wildlife mitigation may be avoided by the United States' originally acquiring the property for non-wildlife mitigation purpose and, then, "converting" that same property to wildlife mitigation purposes?

2. Whether the Federal Water Project Recreation Act, 16 U.S.C. § 460*l*-12 et.seq. (1965) applies to property acquired in connection with the Tennessee Tombigbee Waterway Project which was authorized in 1946, but not constructed until 1978?

3. Whether a statute's legislative history may be used to override the language of the statute as to the statute's effective date?

4. Whether a statute providing that a federal agency may either use a property for a lawful purpose, or offer it for resale to its original owner, gives the agency "discretion" to use property for an unlawful purpose, until such time as it can find a lawful purpose for it?

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OPINIONS BELOW

The District Court's opinion is reported at 906 F.Supp. 369 and attached as Appendix A. The Court of Appeals unpublished opinion is attached as Appendix B.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered

on August 30, 1995 through Writ of Certiorari under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

One statute involved is the Federal Water Project Recreation Act, 16 U.S.C. § 460*l*-12 et.seq. which provides:

> § 460*l*-13. **Non-Federal administration of Project land and water areas.**
>
> (a) - Allocation of costs.
>
> If, before authorization of a project, non-Federal public bodies indicate their intent in writing to agree to administer project land and water areas for recreation or fish and wildlife enhancement or for both of these purposes pursuant to the plan for the development of the project approved by the head of the agency having administrative jurisdiction over it and to bear not less than one-half the separable costs of the project allocated to recreation, and to bear one-quarter of such costs allocated to fish and wildlife enhancement, and not less than one-half the costs of operation, maintenance, and replacement incurred therefor-
>
> (1) the benefits of the project to said purpose or purposes shall be taken into account in determining the economic benefits of the project;
>
> (2) costs shall be allocated to said purpose or

purposes and to other purposes in a manner which will insure that all project purposes share equitably in the advantages of multiple-purpose construction: Provided, that the costs allocated to recreation or fish and wildlife enhancement shall not exceed the lesser of the benefits from those functions or the costs of providing recreation or fish and wildlife enhancement benefits or reasonably equivalent use and location by the least costly alternative means; and

(3) not more than one-half the separable costs of the project allocated to recreation and exactly three-quarters of such costs allocated to fish and wildlife enhancement and all the joint costs of the project allocated to recreation and fish and wildlife enhancement shall be borne by the United States and be nonreimbursable.

Projects authorized during the calendar year 1965 may include recreation and fish and wildlife enhancement on the foregoing basis without the required indication of intent. Execution of an agreement as aforesaid shall be a prerequisite to commencement of construction of any project to which this subsection is applicable.

(b) Non-Federal share of costs

The non-Federal share of the separable costs of the project allocated to recreation and fish and wildlife

enhancement shall be borne by non-Federal interests, under either or both of the following methods as may be determined appropriate by the head of the Federal agency having jurisdiction over the project: (1) payment, or provision of lands, interests therein, or facilities for the project; or (2) repayment, with interest at a rate comparable to that for other interest-bearing functions of Federal water resource projects, within fifty years of first use of project recreation or fish and wildlife enhancement facilities: Provided, That the source of repayment may be limited to entrance and user fees or charges collected at the project by non-Federal interests if the fee schedule and the portion of fees dedicated to repayment are established on a basis calculated to achieve repayment as aforesaid and are made subject to review and renegotiation at intervals of not more than five years.

§ 460*l*-14. **Facilities or project modifications to be provided without written indication of intent**

(a) Other project purposes as justification; public health and safety requirement of minimum facilities at access points; basis for calculation of benefits; nonreimbursable costs.

No facilities or project modifications which will furnish recreation or fish and wildlife enhancement benefits shall be provided in the absence of the

indication of intent with respect thereto specified in section 460*l*-13 (a) of this title unless (1) such facilities or modifications serve other project Purposes and are justified thereby without regard to such incidental recreation or fish and wildlife enhancement benefits as they may have or (2) they are minimum facilities which are required for the public health and safety and are located at access points provided by roads existing at the time of project construction or constructed for the administration and management of the project. Calculation of the recreation and fish and wildlife enhancement benefits in any such case shall be based on the number of visitor-days anticipated in the absence of recreation and fish and wildlife enhancement facilities or modifications except as hereinbefore provided and on the value per visitor-day of the project without such facilities or modifications. Project costs allocated to recreation and fish and wildlife enhancement on this basis shall be nonreimbursable.

(B) Preservation of recreation and fish and wildlife enhancement potential execution of agreements after initial operation of project; disposition of lands in absence of such agreements, prohibition against uses conflicting with project purposes, and preference to uses promoting and not detracting from such potential.

Notwithstanding the absence of an indication of intent as specified in section 460*l*-13 (a) of this title, lands may be provided in connection with project construction to preserve the recreation and fish and wildlife enhancement potential of the project:

(1) If non-Federal public bodies execute an agreement after initial operation of the project (which agreement shall provide that the non-Federal public bodies will administer project land and water areas for recreation or fish and wildlife enhancement or both pursuant to the plan for the development of the project approved by the head of the agency having administrative jurisdiction over it and will bear not less than one-half the costs of lands, facilities, and project modifications provided for recreation, and will bear one-quarter of such costs for fish and wildlife enhancement, and not less than one-half the costs of planning studies, and the costs of operation, maintenance, and replacement attributable thereto) the remainder of the costs of lands, facilities, and project modifications provided pursuant to this paragraph shall be nonreimbursable. Such agreement and subsequent development, however, shall not be the basis for any reallocation of joint costs of the project to recreation or fish and wildlife enhancement.

(2) If, within ten years after initial operation of the project, there is not an executed agreement as

specified in paragraph (1) of this subsection, the head of the agency having jurisdiction over the project may utilize the lands for any lawful purpose within the jurisdiction of his agency, or may offer the land for sale to its immediate prior owner or his immediate heirs at its appraised fair market value as approved by the head of the agency at the time of offer or, if a firm agreement by said owner or his immediate heirs is not executed within ninety days of the date of the offer, may transfer custody of the lands to another Federal agency for use for any lawful purpose within the jurisdiction of that agency, or may lease the lands to a non-Federal public body, or may transfer the lands to the Administrator of General Services for disposition in accordance with the surplus property laws of the United States. In no case shall the lands be used or made available for use for any purpose in conflict with the purposes for which the project was constructed, and in every case except that of an offer to purchase made, as hereinbefore provided, by the prior owner or his heirs preference shall be given to uses which will preserve and promote the recreation and fish and wildlife enhancement potential of the project or, in the absence thereof, will not detract from that potential.

(c) Expansion or modification of existing facilities

(1) Any recreation facility constructed under this part may be expanded or modified if-

(A) the facility is inadequate to meet recreational demands; and

(B) a non-Federal public body executes an agreement which provides that such public body-

(i) will administer the expanded or modified facilities pursuant to a plan for development for the project that is approved by the agency with administrative jurisdiction over the project; and

(ii) will bear not less than one-half of the planning and capital costs of such expansion **or** modification and not less than one-half of the costs of the operation, maintenance, and replacement attributable to the expansion of the facility.

(2) The Federal share of the cost of expanding or modifying a recreational facility described in paragraph (1) may not exceed 50 percent of the total cost of expanding or modifying the facility.

§ 460*l*-21. **Definitions.**

As used in this part:

(a) The term 'project' shall mean a project or any appropriate unit thereof.

Also involved is the Water Resources Development Act

of 1986, 33 U.S.C. § 2283 (b) which provides:

§ 2283. **Fish and wildlife mitigation**

(b) Acquisition of lands or interests in lands for mitigation.

(1) After consultation with appropriate Federal and non-Federal agencies, the Secretary is authorized to mitigate damages to fish and wildlife resulting from any water resources project under his jurisdiction, whether completed, under construction, or to be constructed. Such mitigation may include the acquisition of lands, or interests therein, except that - (A) acquisition under this paragraph shall not be by condemnation in the case of projects completed as of November 17, 1986; or on which at least 10 percent of the physical construction on the project has been completed as of November 17, 1986; and

(B) acquisition of water, or interests therein, under this paragraph, shall not be by condemnation.

The Secretary shall, under the terms of this paragraph, obligate no more than $30,000,000 in any fiscal year. With respect to any water resources project, the authority under this subsection shall not apply to measures that cost more than $7,500,000 or 10 percent of the cost of the project, whichever is greater.

(2) whenever, after his review, the Secretary determines that such mitigation features under this subsection are likely to require condemnation under subparagraph (A) or (B) of paragraph (10) of this subsection, the Secretary shall transmit to Congress a report on such proposed modification, together with his recommendations.

STATEMENT OF THE CASE

In 1946, Congress authorized construction of the Tennessee Tombigbee Waterway, "a continuous waterway from the Tennessee, upper Mississippi, and Ohio valleys to Mobile (Alabama) on the Gulf of Mexico." Environmental Defense Fund, Inc. v. Alexander, 464 F.Supp. 885, 890 (N.D. Miss. 1979), Pub. L. No. 79-4225, 60 Stat. 634 (1946).

For thirty years, no construction began because Congress appropriated no money to build the canal. However, in 1976, Congress finally appropriated construction money and building of the "Tenn-Tom" began. Pub. L. No. 94-355, 90 Stat. 889, 891 (1976).

No Act of Congress authorizes the construction of recreational areas near the canal as part of the Tennessee Tombigbee Project. However, the United States Corps of Engineers broadly construed its authority as also embracing

the authority to build recreational areas near the new waterway. One of some thirty recreational areas proposed to be built was the Barton Ferry Recreation Area, which was to be located in Clay County, Mississippi, not far from the Tennessee Tombigbee canal. The proposed Barton Ferry Recreation Area includes 162 acres of land, which has been in the Uithoven family since 1913. R., p. 111.

In 1978, for the purpose of constructing the Barton Ferry Recreation Area, the United States, through the Corps of Engineers condemned the 162 acres. R., p. 45. On March 4, 1982, title was vested in the United States, pursuant to the Declaration of Takings Act, 40 U.S.C. § 258 (a). R., pp. 45, 50. Petitioner challenged the taking on various grounds, all of which failed. See, United States v. 162.20 Acres of Land, More or Less, Nos. 78-26-S & 78-27-S (N.D. Miss. 1978) (R., pp. 51-58), aff'd & remanded, 639 F.2d 299 (5th Cir.), on remand, 567 F.Supp. 987 (N.D. Miss. 1983), aff'd, 733 F.2d 377 (5th Cir. 1984); Uithoven v. United States Army Corps of Engineers, No. EC87-139-S-D (N.D. Miss. 1988), R., pp. 70-71, aff'd 884 F.2d 844 (5th Cir. 1989).

Although the United States took title to Uithoven's land

(and much other land for the proposed Barton Ferry Recreation Area and 29 other recreational areas), in 1978, the United States has never developed the property for use as a recreation area. Uithoven actually continued to live on the property until March 14, 1991, when the United States bulldozed his home and physically removed him from it. R., p. 229.[1]

Although the United States succeeded in its battle to gain title, it was not able to enjoy the fruits of victory by developing the property as a recreational area. An official report of the Corps of Engineers explained that the United States would be unable to develop the property as a recreational area because of legal requirements that local governments were unwilling to participate. The Corps of Engineers Supplemental Environmental Impact Statement states:

> [T]he Corps has instituted new administrative policies designed to reduce federal expenditures. Many recreation cites at completed Corps projects throughout the name have recently been closed to

[1]Uithoven's battle to retain his property and his forced eviction by the united States drew widespread media attention, including National Public Radio which described it as a "battle between David and Goliath, which Goliath won. All things considered." National Public Radio of March 15, 1991.

> reduce operations and maintenance costs. In addition, the Corps has been *directed to implement a cooperative-development recreation program in consent with a legally constituted non-Federal cost sharing sponsor as stated in the [FWPRA] (Public Law 89-72)* . . . . This policy change applies to the development of *all the initial recreation facilities on the TTW which will not be completed by the end of December 1982* . . . .
>
> A revised interpretation of the [FWPRA] (Public Law 89-72) has been adopted for projects such as the TTW *which were authorized prior to enactment of this law*. Under this policy change, all recreation development on the waterway currently scheduled to be initiated after Fiscal Year 1982 *sharing basis with a state or local government agency* . . . [Table D-4 of the impact statement identifies the Barton Ferry Recreation Area as "[d]eferred pending arrangement of local cost-sharing agreement." (R. At 85)]

R., at pp. 87-88.

The statute referenced in the Corps' Supplemental Environmental Impact Statement, is Pub. L. No. 89-72, the Federal Water Project Recreation Act ("FWPRA," 16 U.S.C. § 460*l*-12 et. seq.) The FWPRA provides that taxpayers' money may not be used for either "recreational" or "wildlife enhancement purposes" unless a local government agrees to

pay half the cost. 16 U.S.C. § 460*l*-14 (b). A federal agency proposing to develop a property for recreational or wildlife enhancement program is given ten years to enter such a cost-sharing agreement, failing which the United States must either convert use of the property to a "lawful" (i.e. non-recreational or non-wildlife enhancement) use, or offer it for sale to the original owner. 16 U.S.C. § 460*l*-14 (b).

Because more than ten years had passed since the property had been condemned and, since "initiation" of the Barton Ferry project, Uithoven requested the Corps comply with the FWPRA by offering the property for resale to him. When the Corps refused to follow the statute's mandate that the property be offered for resale to him, Plaintiff commenced this action, seeking a writ of mandamus. R., pp. 1-6.

Uithoven charged that the property must be offered for sale to him, since it had not been "converted to any lawful use, but is being allowed to lie idle." R., pp. 1-6. The United States moved to dismiss, stating that the FWPRA does not apply, but even if it does, the government has "discretion" as to whether to offer to sale the property back to the original owner. Further, the United States stated its

intent to use the property for "wildlife mitigation," until Congress, at some unknown future date, decides to appropriate money to build a recreational area. R., p. 31. This response admits a current unlawful use, since the FWPRA specifically prohibits a use for "wildlife enhancement" absent a cost-sharing agreement. 16 U.S.C.§ 460*l*-14.

The District Court sustained the government's motion to dismiss. The District Court ruled that the legislative history of the FWPRA indicates that it was not intended to apply to the Barton Ferry Recreation Area because the Barton Ferry Area was to be developed as an incidental part of the Tennessee Tombigbee Waterway Project, and this Project was originally authorized in 1946, prior to the effective date of the FWPRA, which was 1965. The District Court further found that even if the FWPRA does apply, the statute grants the Corps of Engineers' discretion as to whether to offer the property for resale to the original owner. 906 F.Supp. 369 (N.D. Miss. 1995) App. B.

ARGUMENT

THE WRIT SHOULD BE GRANTED IN ORDER

TO CARRY OUT CONGRESS' DIRECTION THAT TAXPAYERS' MONEY IS NOT TO BE SPENT FOR RECREATIONAL OR WILDLIFE PURPOSES ABSENT A COST-SHARING AGREEMENT, AND TO CARRY OUT CONGRESS' DIRECTION THAT PROPERTY MAY NOT BE ACQUIRED FROM UNWILLING SELLERS FOR WILDLIFE MITIGATION.

The most compelling reason for granting the Writ in this case is to fulfill a purpose which Congress has made perfectly clear, but which the United States Corps of Engineers refuses to follow. In 1965, Congress, in enacting the Federal Water Project Recreation Act ("FWPRA"), made plain its intent to conserve scarce resources. No longer were taxpayers' limited funds to be squandered on extravagant recreational projects, or "wildlife mitigation," unless the local citizenry were so supportive as to agree to pay half of their costs. Accord, Omnibus Budget Reconciliation Act of 1990, (Manifesting Congress' intent to balance the budget).

While FWPRA clearly mandates no spending of taxpayers' money on recreational projects, except with a cost-sharing agreement executed within ten years of initiation of the project, the District Court justified its finding that the statute does not apply by relying upon the Act's

legislative history. The District Court cited a House Report which states that "this Act is applicable to all projects authorized after the date of this Act." 906 F.Supp. at 373. The court concluded that since the Barton Ferry Recreation Project was developed by the Corps of Engineers as an incidental part of the Tennessee Tombigbee Waterway Project, and since the Tennessee Tombigbee Waterway Project was authorized in 1946, (though no construction began until thirty years later,) Congress did not intend the FWPRA to apply. 906 F.Supp. at 373-374.

The District Court's interpretation defies reason. It is inconceivable that a Congress, in 1965, intent on saving taxpayers' money, would not have wanted its money saving provision to apply to a work (the Barton Ferry Project) that did not even begin until 1978. 16 U.S.C. § 460*l*-21 (a) says:

> The term "project" shall mean a project or any appropriate unit thereof.

Thus, 16 U.S.C. § 460*l*-15, plainly applies to the Barton Ferry Recreation Area, which is a "unit" of the Tennessee Tombigbee Waterway Project. Disregarding plain language of a statute in favor of the statute's contrary "legislative

history," is condemned by clear precedent from this Court. Reiter v. Sonotone Corporation, 442 U.S. 330 (1979).

The lower courts' failure to follow the statutes' plain language as to which projects are included is not the only frustration of congressional intent found in this case. Congress has told federal agencies that they may not involuntarily take property from unwilling sellers for wildlife mitigation purposes. Water Resources Development Act, 33 U.S.C. § 2283 (b) (1) (A) (1986).

The District Court held, however, that the Water Resources Development Act does not prohibit an agency's acquiring property from an unwilling seller for recreational purposes and then "convert" it to wildlife mitigation. This use for wildlife mitigation can continue until such time (if ever) as Congress appropriates the money to develop a recreational area, 906 F.Supp. at 374. Allowing a federal agency to frustrate a direction of Congress by "converting" property to a forbidden use, rather than acquiring it for the forbidden use in the first place, is too obvious a frustration of Congress' purpose to be tolerated.

The District Court also held that even if the FWPRA or Water Resources Act are violated, the Corps of Engineers'

has discretion as to whether to offer the property for resale to Uithoven. The FWPRA admits of no such "discretion." The FWPRA list only two alternatives; an offer for resale to the original owner, or a lawful use. 16 U.S.C. § 460*l*-14 (b) (2). The Corps of Engineers has admitted that it is not using the property for any lawful purpose since it uses the property for "wildlife mitigation." This is not a lawful use, both because the property was acquired involuntarily, violating the Water Resources Development Act, and because the FWPRA disallows a wildlife mitigation use absent a cost-sharing agreement. When a federal agency is using property for a purpose directly contrary to what Congress has said it may be used for, that agency surely has no "discretion," about whether to follow the only other authorized alternative - that of offering the property for resale. This Court should, therefore, grant the Writ, so as to proclaim that the United States Army Corps of Engineers has only such powers as Congress has specifically given it, and to proclaim that a federal agency does not have the "discretion" to exercise powers which Congress has specifically denied it.

The District Court's decision, affirmed by the Court of Appeals, amounts to a manifesto that a federal agency may

use property unlawfully until Congress decides, at some unascertained future date to change present national policy. Such a preposterous, unjudicial waste of the taxpayers' money ought not be endorsed, and the Writ should be granted to correct the lower courts' fundamental misunderstanding that federal agencies have the unlimited power to override Congressional directives.

Respectfully submitted,
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APPENDIX A

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

FELIX UITHOVEN,

Plaintiff,

VERSUS **NO. 1:93CV106-S-D**

MICHAEL P. W. STONE,
SECRETARY OF THE ARMY,

Defendant.

OPINION

In this case, plaintiff seeks a writ of mandamus to compel defendant to reconvey certain condemned property to him. Presently before the court is defendant's motion to dismiss or, alternatively, for summary judgment. Because matters outside the pleadings were considered by the court, the motion will be treated as one arising under Fed. R. Civ. P. 56. See Fed. R. Civ. P. 12(b).

BACKGROUND

In 1946, the United States Congress authorized the construction of the Tennessee-Tombigbee Waterway Project (Tenn-Tom). Pub. L. No. 525. The Tenn-Tom was

"designed as a navigational project for two-way barge traffic to connect the north-flowing Tennessee River with the south-flowing Tombigbee River so as to provide a continuous waterway from the Tennessee, upper Mississippi and Ohio Valleys to the tidewater Port of Mobile on the Gulf of Mexico." Environmental Defense Fund, Inc. v. Alexander, 467 F. Supp. 885, 890 (N.D. Miss. 1979), aff'd 614 F.2d 474 (5th Cir.), cert. denied, 449 U.S. 919 (1980). In 1976, Congress appropriated funds for the Columbus Lock and Dam located in Mississippi on the Tombigbee River. Pub. L. No. 94-355. Nine years later, the entire project was open and available for commercial navigation.

As part of the Columbus portion of the project, the United States Corps of Engineers sought condemnation of numerous tracts of land in Clay County, Mississippi, including approximately 162 acres owned by the plaintiff, Felix Uithoven. See United States v. 162.20 Acres of Land, Nos. EC78-26-S & EC78-27-S (N.D. Miss. Feb. 14, 1978). By order dated March 4, 1982, the court fixed just compensation for the Uithoven property at $124,000.00 and officially vested title to the tract in the United States. Throughout the next 13 years, Uithoven contested the

condemnation on various grounds, including failure to comply with the National Historic Preservation Act, the National Environmental Policy Act, the Federal Tort Claims Act, and state law. He was unsuccessful in each judicial outing, and in 1991, this court sanctioned Uithoven and his attorney and ordered Uithoven to vacate the subject property. On March 14, 1991, Uithoven was evicted.

Uithoven then filed suit in the United States District Court for the District of Columbia under 28 U.S.C. § 1361, seeking a writ of mandamus to compel the Corps of Engineers to resell the Clay County property to him. The government moved to dismiss, and when Uithoven did not file a timely response, the court dismissed the case for improper venue and on the merits, finding that Uithoven"ha[d] failed to identify any statutory or constitutional provision that satisfies the mandamus standard." The court subsequently denied Uithoven's motion to alter or amend judgment, and he appealed to the United States Court of Appeals for the District of Columbia Circuit. Upon motion of the government, the appeals court granted summary affirmance, finding that the "district court properly dismissed the complaint for improper venue." Uithoven then

filed a motion to clarify judgment, which the court denied, stating that the court's order "clearly addressed only the district court's disposition of the venue issue, and not the court's resolution of the merits."

This mandamus action ensued. In it, Uithoven seeks to compel the defendant, the Secretary of the Army, "to perform a duty owed to [him]," namely "offer[ing] the property, which was condemned in 1978, for sale to Plaintiff, Felix E. Uithoven." Basing his mandamus request on the Federal Water Project Recreation Act (FWPRA), Uithoven argues that because defendant failed to secure a cost-sharing agreement with a local government for recreation development and because the land is not being used for "any lawful purpose," he must offer the land for resale to Uithoven. Under Uithoven's view, defendant's failure to do so indicates "that the real reason for the refusal to sell the land must be that officials of the United States are angered at Plaintiff because he has filed numerous legal proceedings protesting the original condemnation and because of his resistance to the condemnation."

In response, defendant filed a motion to dismiss or, alternatively, for summary judgment. Initially, he argues that

this cause is barred by res judicata based on the proceedings before the District of Columbia courts. Alternatively, he contends that the FWPRA does not apply to the Tenn-Tom but that even if it does, Uithoven is not entitled to a writ of mandamus, as defendant has a discretionary, not a mandatory, duty to reconvey the property to Uithoven since the property, which is encompassed within the Barton Ferry Recreation Area, is being used for a lawful purpose, having been scheduled for future development and presently being used on a temporary basis for wildlife mitigation.

DISCUSSION

I.

Although a judgment affirmed on appeal usually has conclusive effect, where "the appellate court affirms on one ground [underlying a lower court's judgment] without passing on the other, the second ground is no longer conclusively established under the collateral estoppel doctrine." 1B James Wm. Moore & Jo Desha Lucas, Moore's Federal Practice para 0.416[2] (2d ed. 1995). See Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 342 (5th Cir. 1982) ("[O]nce an appellate court has disposed of a case on the basis of one of several alternative issues that may

have grounded a trial court's judgment, the issue decided on appeal is conclusively established for purposes of issue preclusion"); Hicks v. Quaker Oats Co., 662 F.2d 1158, 1168 (5th Cir. 1981) ('[T]he general rule is that if a judgment is appealed, collateral estoppel only works as to those issues specifically passed upon by the appellate court"); see also International Refugee Organization v. Republic S.S. Corp., 189 F.2d 858, 862 (4th Cir. 1951).

After careful consideration, the court finds that the instant case falls squarely within the reach of these authorities since the appeals court reached only the improper venue issue and did not address the district court's ruling dismissing Uithoven's case on the merits. Although the district court's ruling on the merits remains intact, it simply has no res judicata effect here, and this court will therefore proceed to consider the other bases of defendant's request for dismissal.

II.

A.

28 U.S.C. § 1361 provides; "The district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any

agency thereof to perform a duty owed to the plaintiff." A writ of mandamus is not available to review discretionary acts of officials, as it is "an appropriate remedy only when the plaintiff's claim is clear and certain and the duty of the officer is ministerial and so plainly prescribed as to be free from doubt." Giddings v. Chandler, 979 F.2d 1104, 1108 (5th Cir. 1992) (internal quotations omitted). "It is hornbook law that mandamus is an extraordinary remedy which should be utilized only in the clearest and most compelling of cases. Though it is a legal remedy, it is largely controlled by equitable principles and its issuance is a matter of judicial discretion." Carter v. Seamans, 411 F.2d 767, 773 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970).

> Generally speaking, before the writ of mandamus may properly issue three elements must coexist: (1) a clear right in the plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; (3) no other adequate remedy available. In connection with the last requirement, it is important to bear in mind that mandamus does not supersede other remedies, but rather comes into play where there is a want of such remedies. Admittedly the alternative remedy must be adequate, i.e., capable of affording full relief as to the very subject matter in

question.

Carter, 411 F.2d at 773.

B.

Because Uithoven contends that the Federal Water Project Recreation Act (FWPRA) controls defendant's alleged duty to reconvey the Clay County property to him, the court begins with a consideration of that Act, which opens, in pertinent part, with the following policy statement:

> It is the policy of the Congress and the intent of this part that (a) in investigating and planning any Federal navigation, flood control, reclamation, hydroelectric, or multiple-purpose water resource project, full consideration shall be given to the opportunities, if any, which the project affords for outdoor recreation and for fish and wildlife enhancement and that, wherever any such project can reasonably serve either or both of these purposes consistently with the provisions of this part, it shall be constructed, operated, and maintained accordingly . . . .

16 U.S.C. § 460*l*-12 (emphasis added). To effectuate that purpose, the FWPRA requires, before any water project is authorized, a letter of intent from a non-federal public body agreeing "to administer project land and water areas for recreation or fish and wildlife enhancement or both . . . and

to bear not less than one-half the . . . costs of the [recreation] project . . . and one-quarter of such costs allocated to fish and wildlife enhancement . . .". 16 U.S.C. § 460*l*-13. Even if a letter of intent is not procured before project authorization, "lands may be provided in connection with project construction to preserve the recreation and fish and wildlife enhancement potential of the project," 16 U.S.C. § 460*l*-14(b), if a cost sharing agreement is executed within ten years after initial operation of the project. 16 U.S.C. § 460*l*-14(b) (1). Of importance to Uithoven's argument is the following subsection, which addresses the situation in which a cost-sharing agreement is not procured within that time period:

> If, within ten years after initial operation of the project, there is not an executed agreement as specified in paragraph (1) of this subsection, the head of the agency having jurisdiction over the project may utilize the lands for any lawful purpose within the jurisdiction of his agency, or may offer the land for sale to its immediate prior owner or his immediate heirs at its appraised fair market value . . . or, if a firm agreement by said owner or his immediate heirs is not executed within ninety days of the date of the offer, may transfer custody of the lands to another Federal

> agency . . . or may lease the lands to a non-Federal public body, or may transfer the lands to the Administrator of General Services for disposition [as surplus property]. In no case shall the lands be used or made available for use for any purpose in conflict with the purposes for which the project was constructed. . . .

16 U.S.C. § 460*l*-14 (b) (2) (emphasis added).

In support of dismissal, defendant argues that (1) the FWPRA does not apply to the Tenn-Tom and (2) even if it is applicable, defendant has discretion regarding reconveyance to the prior owner, Uithoven. In response, Uithoven insists that defendant has admitted the applicability of the FWPRA, pointing to an environmental impact statement (EIS) which states that the Corps of Engineers

> has been directed to implement a cooperative-development recreation program in consent with a legally constituted non-federal cost sharing sponsor as stated in the Federal Water Project Recreation Act . . . This policy change applies to the development of all the initial recreation facilities on the [Tenn-Tom] which will not be completed by the end of December, 1982.

He also maintains that because the Clay County property is being used for wildlife mitigation rather than recreation or

transportation, and because it was taken by condemnation, it is not being used for a lawful purpose and must therefore be offered for resale to Uithoven. This argument hinges on language in the Water Resources Development Act (WRDA), which provides as follows:

> [T]he Secretary [of the Army] is authorized to mitigate damages to fish and wildlife resulting from any water resource project under his jurisdiction, whether completed, under construction, or to be constructed. Such mitigation may include the acquisition of lands . . . except that --
>
> > (A) acquisition under this paragraph shall not be by condemnation in the case of projects completed as of November 17, 1986. . . .

33 U.S.C. § 2283(b) (emphasis added).

The court thus turns to defendant's first ground for dismissal, i.e., the applicability of the FWPRA, which is silent as to the projects to which it applies. Defendant points to only one case which discusses that issue in the context of projects authorized before the passage of the FWPRA. In Sierra Club v. Froehlke, 392 F.Supp. 130 (E.D. Mo. 1975), aff'd on other grounds, 534 F.2d 1289 (8th Cir. 1976), the plaintiff challenged the construction of the Meramec Park

Reservoir on the Meramec River in Missouri. That project had been authorized by Congress as part of the Flood Control Act of 1938 with funds being appropriated in 1966 for its construction. Sierra Club, 392 F.Supp. at 142. Plaintiff argued that the project violated the FWPRA since the Corps of Engineers had neither requested nor received a cost-sharing agreement from the state of Missouri. Id. In construing the FWPRA, the district court, without explanation, held that "projects such as the Meramec Park Reservoir, which were previously authorized are clearly not covered by the [FWPRA]." Id. The court found further support for its conclusion in the Flood Control Act of 1966. Id.

Having carefully considered the matter, the court is of the opinion that there is language in the statute itself to indicate that Congress intended the FWPRA to apply only to projects authorized after 1965. See 16 U.S.C. 460*l*-12 ("in investigating and planning any Federal . . . water resource project . . .") However, because the FWPRA is less than clear on this issue, the court turns to the legislative history of that act which, in this court's opinion, squarely answers the question. The House Report unequivocally states, "This act

is applicable to all projects authorized after the date of this act, including those that may be authorized during 1965." H.R. Rep. No. 254, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S.C.C.A.N. 1864, 1867. The FWPRA, therefore, does not apply to the Tenn-Tom, which was authorized nineteen years earlier.

Uithoven does not dispute the validity of Sierra Club or the legislative history of the FWPRA. Rather, as previously stated, he argues that defendant has admitted the applicability of the act and focuses on language contained in an EIS which references the FWPRA and its cost-sharing measures. After careful consideration, the court is unpersuaded by Uithoven's argument. Defendant's decision to implement, as a matter of policy, the cost-sharing goals of the FWPRA, without the attendant time schedules, is not, in this court's opinion, an admission that the FWPRA is applicable to the Tenn-Tom. In fact, the final supplement to the EIS, dated April, 1982, anticipates the situation in which "cost sharing arrangements do not materialize" along the Tenn-Tom. In that event,

> this would represent a restricted development situation from the standpoint of providing

> recreational facilities . . . . Under the restricted development scenario project land acquired for recreation which is not developed would be available for wildlife management and timber production and could be utilized for public hunting and/or less intensive recreational activities where developed facilities are not required.

These statement differ considerably from the comparable provisions of the FWPRA, see 16 U.S.C. § 460*l*-14, and lend additional support to defendant's argument that the FWPRA is inapplicable in this case. Uithoven can find no relief in the 1974 amendments to the FWPRA affecting its cost-sharing provisions, or Congress' determination that the changes "shall apply to all projects the construction of which is not substantially completed on [March 7, 1974]," since, as the court has found, the FWPRA does not reach the Tenn-Tom.

Assuming arguendo that the FWPRA does control defendant's disposition of the former Uithoven property, the court is of the opinion that the act does not mandate reconveyance. Section 460*l*-14(b) (2) is phrased in the disjunctive with permissive language, thereby giving defendant discretion as to the use of the property and its disposition.

Uithoven's argument does not center on the nature of the

statutory language, however, but focuses instead on the question (which he believes is factual in nature) of whether defendant is using the property for a lawful purpose. If not, according to Uithoven, defendant must afford him the opportunity to repurchase it. As previously noted, Uithoven argues that using the property for wildlife mitigation violates the Water Resources Development Act (WRDA). The court does not agree. Although the WRDA prohibits defendant from condemning property "under this paragraph" for wildlife mitigation, it does not prevent defendant from using property previously condemned via other legislation for that purpose. See also Pub. L. No. 99-662, § 601(a). Uithoven's assertion that defendant has allowed the property to "lie idle and has done nothing to use it for any purpose whatever" is to no avail. The affidavits and depositions of officials of the Corps of Engineers indicate (1) that the timber has been selectively cut on the property "to reduce competition and improve wildlife habitat" and (2) that "[a]llow[ing] nature to have it" in the situation "where they don't put any money in it but just allow people to go in there and enjoy nature" is a viable form of mitigation.

Uithoven's final argument in support of mandamus is

that even if the FWPRA does not require defendant to reconvey the property, "no serious reader of the statute can doubt that [it] permits such a reconveyance" and therefore a "fact-finder could legitimately find that the reason Defendant will not agree to sell the property back to [him] is that he has initiated extensive litigation . . . against the United States protesting the original condemnation." In Uithoven's eyes, defendant's refusal to do what is permitted is a violation of the First Amendment. Even if the court allows Uithoven that assumption, it is of little use, as an allegation that defendant has violated the Constitution alone is insufficient for the issuance of a writ of mandamus. City of Milwaukee v. Saxbe, 546 F.2d 693, 700 (7th Cir. 1976). What must be focused on instead is the constitutional duty owed to Uithoven "to do the act in question." Carter, 411 F.2d at 773. As Uithoven has failed to direct the court's attention towards any constitutional right to reconveyance or any duty on defendant's part to perform that act, his petition on constitutional grounds fails as well.

CONCLUSION

Having carefully considered the evidence, the argument of counsel, and the applicable case law, the court finds that

as defendant is under no constitutional or statutory duty to reconvey the Clay County property to plaintiff and plaintiff has no such right in reconveyance and as there are no genuine issues of material fact, defendant is entitled to summary dismissal of this action.

An appropriate final judgment shall issue.

This 21st day of November, 1995.

_____

CHIEF JUDGE

No.

In The

Supreme Court of the United States

October Term, 1996

FELIX UITHOVEN,

Petitioner,

VERSUS

MICHAEL P. W. STONE,
SECRETARY OF THE ARMY,

Respondent.

APPENDIX B

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UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 95-60771

FELIX UITHOVEN,

Plaintiff-Appellant,

VERSUS

MICHAEL P W STONE, Secretary of the Army

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Mississippi
(1:93-CV-106-S-D)

Before DUHE and DENNIS, Circuit Judges and DUVAL,[1] District Judge. PER CURIAM:[2]

Having carefully considered the record and the written and oral argument of counsel, we can find no error on the part of the district court.

According we affirm essentially for the reasons assigned by the district court.

AFFIRMED.

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[1]District Judge of the Eastern District of Louisiana, sitting my designation.

[2]Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.